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21 **UNITED STATES DISTRICT COURT**

22 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

23 JAMES C. KANG, an individual, MICHAEL
24 MOSES, an individual, on behalf of themselves
25 and all others similarly situated,

26 Plaintiffs,
27 v.

28 WELL'S FARGO BANK, N.A.; and DOES 1
through 10, inclusive,

Defendant.

29 PATRICIA BARRERAS, an individual,
30 JACQUELINE F. IBARRA, an individual, on
31 behalf of themselves and all others similarly
32 situated,

33 Plaintiffs,

34 v.

35 WELL'S FARGO BANK, N.A.; and DOES 1
36 through 10, inclusive,

37 Defendant.

38 Case No. 5:17-cv-06220-BLF
39 Case No. 5:21-cv-00071-BLF

40 Complaint filed: October 27, 2017

41 **PLAINTIFFS' NOTICE OF MOTION AND
42 MOTION FOR FINAL APPROVAL OF
43 PROPOSED CLASS ACTION
44 SETTLEMENT; MEMORANDUM OF
45 POINTS & AUTHORITIES**

46 Date: September 15, 2021

47 Time: 9:00 a.m.

48 Location: Courtroom 3

1 (continued from previous page)

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 15, 2021 at 9:00 a.m., or as soon thereafter as the parties may be heard, in Courtroom 3 of the U.S. District Court for the Northern District of California, 280 South 1st St., San Jose, CA, 95113, plaintiffs James Kang, Michael Moses, and Jacqueline F. Ibarra, individually and on behalf of all similarly situated employees, will and hereby do move the Court pursuant to Fed. R. Civ. P. 23(e) for an order:

1. Confirming as final the certification of the Settlement Class, Rest Period Subclass, and Non-Rest Period Subclass as defined in the Settlement, pursuant to Rule 23;
 2. Confirming as final the appointment of plaintiffs James Kang, Michael Moses, and Jacqueline F. Ibarra as the class representatives of the Settlement Class and Subclasses pursuant to Rule 23;
 3. Confirming as final the appointment of plaintiffs' attorneys as Class Counsel for the class pursuant to Rule 23(g);
 4. Granting final approval of the proposed \$95,696,122.35 non-reversionary global settlement of *Kang v. Wells Fargo Bank, N.A.*, N.D. Cal. Case No. 5:17-cv-06220-BLF, and *Ibarra v. Wells Fargo Bank, N.A.*, N.D. Cal. Case No. 5:21-cv-00071-BLF, as set forth in the Joint Stipulation of Class Settlement, as amended ("Settlement" or "Agreement") (Dkt. 109, Exh. 1) as fair, reasonable, and adequate, and binding on all Settlement Class Members;
 5. Directing the Parties and the Settlement Administrator to implement the terms of the Settlement pertaining to the distribution of the settlement fund;
 6. Making findings of fact and stating conclusions of law in support of the foregoing; and
 7. Directing the entry of judgment.

This Motion is based upon Stipulation of Settlement of Class Action and Release of Claims, as amended (Dkt. 109, Exh. 1), the accompanying Memorandum of Points & Authorities, the Settlement Agreement, the Declarations of Paul D. Stevens, Joshua H. Haffner, Michael Rubin, James Kang, Michael Moses, and Chris Pikus filed herewith, all papers and pleadings on file in this action, and such oral argument as may be considered by the Court at the time of the hearing.

1 DATED: May 28, 2021

Respectfully submitted,

2
3 **HAFFNER LAW PC**
4 **STEVENS, L.C.**
5 **ALTSCHULER BERZON LLP**

6 By: /s/ Paul D. Stevens

7 Paul D. Stevens

8 Attorneys for Plaintiffs James C. Kang,
9 Michael Moses, Jacqueline Ibarra, and the
10 Class

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Plaintiffs James Kang, Michael Moses, and Jacqueline F. Ibarra seek final approval of a proposed global class action settlement in the consolidated cases of *Kang v. Wells Fargo Bank, N.A.*, N.D. Cal. Case No. 5:17-cv-06220-BLF, and *Patricia Barreras and Jacqueline F. Ibarra v. Wells Fargo Bank, N.A.* (“*Ibarra*”), N.D. Cal. Case No. 3:21-cv-00071-BLF. The settlement resolves all claims brought by a class comprised of home mortgage consultants (“HMCs”) employed by Wells Fargo Bank in California between 2013 and 2019, who allege that Wells Fargo violated California rest period law and certain other California wage-and-hour laws during that period.

The \$95,696,122.35 aggregate settlement value, which is entirely non-reversionary, is an extraordinary result for the approximately 4,939 class members covered by the proposed Settlement Agreement, as amended (attached as Exh. 1 to the Declaration of Paul D. Stevens; hereafter “Settlement” or “Agreement”). The individual recoveries from the net settlement fund *on average* will be \$12,762.69. In addition, Wells Fargo discontinued its challenged pay practices during the pendency of this litigation, meaning that class members and future HMCs will be receiving additional workplace benefits as a result of this action for many years to come.

The Settlement is particularly remarkable given the enormous ongoing litigation risk faced by the class on the central issue in dispute, namely, the proper statutory interpretation of California Labor Code §226.7’s premium pay language. Throughout the four years of this litigation, the majority of court decisions construing Section 226.7 accepted Wells Fargo’s position that the premium pay for a non-compliant rest period is an hour of pay at the employee’s base hourly rate, not an hour of pay calculated at the employee’s “regular rate” as that term is used in wage-and-hour law, i.e., as including all forms of remuneration. While the *Ibarra* case was pending on appeal in the Ninth Circuit, a California Court of Appeal panel issued the first California appellate decision on this issue, in which it adopted that majority construction (over a powerful dissent from Presiding Justice Lee Smalley Edmon). That California case, *Ferra v. Loews Hollywood Hotel*, 40 Cal.App.5th 1239 (2019), now awaits decision by the California Supreme Court, which held oral

1 argument on May 18, 2021. If the Court of Appeal majority's statutory interpretation prevails, and
 2 if *Ibarra* and *Kang* had *not* settled, the class members' recoveries for rest period claims would be
 3 just a small fraction of the amounts provided by the proposed \$95.6 million settlement.

4 By this motion, plaintiffs seek final approval of the settlement, including the class
 5 representative service awards of \$10,000 each to plaintiffs Kang and Moses. (Plaintiff Ibarra has
 6 already received a \$10,000 service award, which was approved by Judge Percy Anderson and paid
 7 before the *Ibarra* case was transferred to this Court.) The settlement, including the class
 8 representative service awards, should be approved because it is fair and reasonable.

9 By separate motion filed today, plaintiffs seek approval of Class Counsel's request for
 10 attorneys' fees and litigation expenses, to be paid from the common fund.

11 II. BACKGROUND

12 A. History of the Litigation

13 The proposed settlement will resolve all claims asserted in these consolidated class actions.
 14 In *Ibarra*, the plaintiff asserted class claims for California rest period violations, relying on
 15 *Vaquero v. Stoneledge Furniture, LLC*, 9 Cal.App.5th 98 (2017), and Labor Code §226.7, and
 16 alleging that Wells Fargo's HMC commission-based compensation structure unlawfully failed to
 17 properly compensate class members for their non-working rest period time. In *Kang* and *Moses*,
 18 which were follow-on cases to *Ibarra* (later consolidated in this Court), the plaintiffs asserted
 19 those same claims on behalf of additional class members and alleged additional wage-and-hour
 20 and Labor Code Private Attorneys General ("PAGA") claims on behalf of California HMCs,
 21 including the *Ibarra* class members.

22 The principal dispute between the parties in these actions concerns the proper construction
 23 of the premium pay language in Labor Code §226.7(c). When these cases were filed, that question
 24 of California statutory interpretation had not been decided by any California appellate court.
 25 Plaintiffs contended that calculation of Section 226.7 premium pay, defined as "one hour of
 26 additional pay at the employee's regular rate of compensation," must include all nondiscretionary
 27 remuneration to the employee (much as the term "regular rate of pay" is construed in wage-and-
 28 hour law, including under California overtime law). Wells Fargo, by contrast, contended that the

1 premium pay calculation must be based solely on the \$12-per-hour advances against commissions
 2 that it provided to its California HMCs. Stevens Decl., ¶12 (*Ibarra* Dkt. 50).

3 *Ibarra* was filed on March 17, 2017 in the Los Angeles Superior Court and was thereafter
 4 removed to the U.S. District Court for the Central District of California. Stevens Decl., ¶8 (*Ibarra*
 5 Dkt. 1-1). In the amended complaint, the *Ibarra* plaintiffs alleged a single claim of rest period
 6 violations under Labor Code §226.7 and a related claim under California’s Unfair Competition
 7 Law. *Ibarra* Dkt. 1-1.

8 The parties stipulated to the certification of a class comprised of all HMCs employed by
 9 Wells Fargo in California at any time between March 13, 2013 and August 1, 2017. Stevens Decl.,
 10 ¶9 (*Ibarra* Dkt. 18). Following discovery, the parties brought cross-motions for summary
 11 judgment based on stipulated facts. On January 19, 2018, the district court granted plaintiff’s
 12 motion and denied defendant’s, finding Wells Fargo liable for failing to provide legally compliant
 13 rest periods. Stevens Decl., ¶10 (*Ibarra* Dkt. 35). The parties also conducted discovery regarding
 14 the damages calculations and retained damages experts with whom the parties worked extensively
 15 in preparing damages calculations, culminating in a stipulation as to the amount of damages that
 16 would be awarded depending on which side’s legal theories prevailed. Stevens Decl., ¶11.

17 The parties stipulated that the classwide damages were \$24,472,114.36 if Wells Fargo’s
 18 interpretation of Section 226.7 were correct, and \$97,284,817.91 – nearly four times as much – if
 19 plaintiff’s interpretation were correct. Judge Anderson eventually ruled that plaintiff’s
 20 interpretation was correct, and entered judgment in favor of the class in the amount of
 21 \$97,284,817.91. Stevens Decl., ¶13 (*Ibarra* Dkt. 50).

22 Wells Fargo appealed, arguing that it was not liable to the class at all, and that even if
 23 liability could be established, Wells Fargo’s construction of the premium pay language should
 24 have prevailed. Stevens Decl., ¶14. After the appeal was fully briefed and awaiting oral argument,
 25 the California Court of Appeal decided *Ferra*, 40 Cal.App.5th 1239, which addressed the statutory
 26 interpretation of Section 226.7’s premium pay language as a matter of first impression in the
 27 California appellate courts. Stevens Decl., ¶16. The panel majority ruled that premium pay
 28 calculations under Section 226.7 must be based solely on the employee’s base hourly rate of pay,

1 not all forms of nondiscretionary remuneration. *Ferra*, 40 Cal.App.5th at 1246-52. In dissent,
 2 Presiding Justice Edmon rebutted the majority's analysis and concluded that the Legislature and
 3 Industrial Welfare Commission had intended premium pay under Section 226.7 and its Wage
 4 Order counterpart to be calculated based on all forms of nondiscretionary remuneration, just like
 5 overtime pay. *Id.* at 1255-68.

6 On April 15, 2020, the Ninth Circuit entered a memorandum decision in *Ibarra* that
 7 affirmed the district court's liability finding; instructed the district court to order a distribution to
 8 the class of the \$24,472,114.36 that the parties had stipulated would be owed if Wells Fargo's
 9 statutory interpretation were correct; and further instructed the district court to hold the case
 10 pending the outcome of *Ferra* in the California Supreme Court (which could either resolve the
 11 parties' dispute over the intended meaning of Section 226.7 or require further litigation in *Ibarra*,
 12 given the factual differences between Wells Fargo's HMC compensation scheme and the *Ferra*
 13 defendant's). Stevens Decl., ¶20 (*Ibarra* Dkt. 80 at 7-9). (*Ferra* was argued on May 18, 2021, will
 14 be decided before mid-August. Rubin Decl. ¶15.)

15 On remand, Judge Anderson ordered Wells Fargo to pay \$24,472,114.36 plus post-
 16 judgment interest. Stevens Decl., ¶21 (*Ibarra* Dkt. 90). On July 30, 2020, Wells Fargo paid
 17 \$25,696,122.35 toward satisfaction of the *Ibarra* judgment. *Id.* Of that amount, \$10,000 was paid
 18 to plaintiff Jacqueline Ibarra as a court-approved class representative service award, \$30,000 was
 19 distributed for administration of payments to *Ibarra* class members, and \$6,424,030.59 was held
 20 back in an account managed by the administrator pending further fees-related proceedings. *Id.* The
 21 remaining \$19,232,091.76 was distributed to *Ibarra* class members on November 13, 2020. *Id.*

22 After staying further merits proceedings in *Ibarra* pending the resolution of *Ferra* in the
 23 California Supreme Court, Stevens Decl., ¶22 (*Ibarra* Dkt. 90), Judge Anderson transferred *Ibarra*
 24 to this Court pursuant to the parties' post-settlement stipulation, *id.* (*Ibarra* Dkt. 94, 96).

25 While *Ibarra* was still pending in the Central District, class counsel filed the *Kang* and
 26 *Moses* class actions in this Court. The original *Kang* complaint was filed October 17, 2017, prior
 27 to briefing and judgment decisions on the parties' cross motions for summary judgment in *Ibarra*,
 28 and alleged that Wells Fargo's HMC pay structure gave rise to minimum wage and vacation pay

1 violations. That case also included a claim for waiting time penalties under Labor Code §203 on
 2 behalf of a class of HMCs who had worked for Wells Fargo in California on or after October 23,
 3 2013. *Kang* Dkt. 1. *Moses* added a rest period claim on the same legal theory that had been
 4 asserted in *Ibarra*, on behalf of HMCs who had worked for Wells Fargo in California at any time
 5 between August 2, 2017 (the day after the *Ibarra* class period closed) and March 31, 2018 (the day
 6 Wells Fargo discontinued its pay practice that was alleged to have violated California rest period
 7 law). *Moses* also asserted a claim for PAGA penalties based on the underlying Labor Code
 8 violations alleged in *Moses* and *Kang*. These additional claims all arose from the same
 9 commission-based HMC pay structure that gave rise to the rest period claims in *Ibarra* and *Kang*.

10 This Court subsequently consolidated *Kang* and *Moses* and certified a rest period subclass
 11 consisting of HMCs who worked for Wells Fargo in California at any time between August 2,
 12 2017 and March 31, 2018. With respect to the other claims asserted in *Kang*, the Court granted
 13 plaintiffs' motion to certify a class of HMCs who worked for Wells Fargo in California from
 14 October 23, 2013 through the date class notice was mailed. *Kang* Dkt. 63 at 11, *Kang* Dkt. 62; see
 15 also *Kang* Dkt. 76 (notice mailed on April 15, 2019).

16 The Court also stayed *Kang* pending the Ninth Circuit's ruling in *Ibarra*. *Kang* Dkt. 77.
 17 After the parties informed this Court of the Ninth Circuit's decision in *Ibarra*, the Court stayed
 18 *Kang* again through October 31, 2020, pending a planned global mediation of both cases. *Kang*
 19 Dkt. 85.

20 Although an earlier mediation in *Ibarra* had been unsuccessful, the parties successfully
 21 reached a proposed global settlement in principle of all of the claims in *Ibarra* and *Kang* following
 22 a day-long mediation with the assistance of mediator David Rotman on October 21, 2020. Stevens
 23 Decl., ¶¶28-29. The parties then continued negotiating over specific terms for three more months
 24 before reaching agreement on all terms set forth in their long-form settlement agreement. *Id.* ¶30.

25 The parties agreed in that Settlement to seek preliminary and final approval before a single
 26 court in order to minimize class member confusion and limit the expenditure of the courts' and
 27 parties' time and resources on settlement approval. Settlement ¶9; Stevens Decl., ¶31. After Judge
 28 Anderson approved the transfer of *Ibarra* to the Northern District of California, Stevens Decl.,

¶32 (*Ibarra* Dkt. 94, 96), that case was consolidated with *Kang*. *Kang* Dkt. 92, 103. After the parties made small amendments to the Settlement in response to this Court’s instructions, this Court granted preliminary approval of the proposed global settlement on April 1, 2021. *Kang* Dkt. 109, 110.

B. Key Provisions of the Settlement

Overview. The overall settlement value includes the \$25,696,122.35 that Wells Fargo has already paid to the *Ibarra* class, plus an additional \$70 million in new money, for a gross settlement fund of \$95,696,122.35. Settlement ¶35. The fully non-reversionary global settlement amount will resolve all claims in *Ibarra* and *Kang*. *Id.* ¶33.

Settlement Class Definition. The overall settlement class encompasses all HMCs who worked for Wells Fargo in California at any time from March 17, 2013 through December 31, 2019, subject to narrow exclusions. The settlement class includes all members of the previously certified *Ibarra* and *Kang* classes, as well as HMCs who had previously been excluded from the *Kang* classes on the basis that they had signed individual arbitration agreements in connection with their employment. Settlement ¶32; Dkt. 96-1, ¶¶34-36.

The Settlement Class includes two subclasses. The Rest Period Subclass includes all HMCs who worked for Wells Fargo in California between March 17, 2013 and March 31, 2018, when Wells Fargo changed the pay practice that was the basis of the rest period claims in *Ibarra* and *Kang*. The Non-Rest Period Subclass includes all HMCs who worked for Wells Fargo in California from October 27, 2013 through December 31, 2019, when Wells Fargo changed its HMC compensation structure from the structure challenged in *Kang*. Settlement ¶32.

PAGA Payment. The settlement allocates \$750,000 to civil penalties under PAGA, of which 75% (\$562,500) will be paid to the California Labor & Workforce Development Agency (“LWDA”). The remainder will be included in the net settlement fund for individual class member settlement payments. Settlement ¶39.

Plan of Distribution and Settlement Payments to Class Members. The net settlement proceeds available for distribution to class members (after deducting attorneys’ fees, litigation expenses, administrative costs capped at \$80,000, *see* Dkt. 109, ¶7, the LWDA payment, and class

1 representative service awards) is approximately \$63,034,915.35 for a class of 4,939 individuals.
 2 Class members who do not opt out will be mailed a settlement payment automatically, without
 3 having to file a claim. Settlement ¶34. Those checks will be negotiable for 180 days after mailing.
 4 Any residual will be redistributed to class members who cashed their initial settlement checks.
 5 Settlement ¶49.

6 The parties have allocated 90% of the net settlement fund – including the \$19.2 million
 7 that was distributed to *Ibarra* class members in November 2020 and the amount previously held
 8 back for attorneys’ fees from the amount already paid by Wells Fargo – to the rest period claims
 9 asserted in *Ibarra* and *Kang* (the “Rest Period Allocation”). This amount will be distributed to
 10 Rest Period Subclass Members pro rata based on eligible workdays and will be offset by payments
 11 received in the November 2020 *Ibarra* distribution. Settlement ¶42(a).

12 The remaining 10% of the net settlement fund is allocated to the minimum wage, vacation
 13 pay, and waiting time penalty claims asserted in *Kang* (the “Non-Rest Period Allocation”).
 14 Settlement ¶42(b). That amount will be distributed pro rata to members of the Non-Rest Period
 15 Subclass. *Id.* Fifty percent of any payment from the Non-Rest Period Allocation will be treated as
 16 taxable wages subject to payroll tax withholding. Settlement ¶50. Wells Fargo will separately pay
 17 the employer’s share of payroll taxes. Settlement ¶36.

18 The Settlement Administrator has estimated class members’ individual settlement
 19 payments based on Wells Fargo’s payroll data. Settlement ¶42(a), (b). The payments already made
 20 to class members in the November 2020 *Ibarra* distribution were *on average* \$3,893.92, and
 21 ranged as high as \$22,749.93, even with the set-aside for attorney’s fees. Stevens Decl., ¶45
 22 (discussing Pikus Decl., Exh. B). The Settlement Administrator has estimated *additional*
 23 recoveries for class members from the \$70 million in new money added to the settlement fund)
 24 will average \$14,172 and will reach as high as \$65,568.19. *Id.* (discussing Pikus Decl., Exh. B).
 25 The highest gross settlement share (reflecting the first *Ibarra* payment and the additional
 26 settlement money) is \$80,149.13. Individual shares of the gross fund exceed \$50,000 for 595 class
 27 members. *Id.* (discussing Pikus Decl., Exh. B). Individual recoveries from the *net* settlement fund,
 28 assuming the Court awards one-third of the fund as attorneys’ fees, are equally impressive. The

1 *total* estimated individual settlement payments to class members from the *net* settlement fund will
 2 range as high as \$53,122.41. *Id.* ¶46 (discussing Pikus Decl., Exh. C). The estimated *average total*
 3 *net* payment from the settlement fund is \$12,762.69. *Id.* (discussing Pikus Decl., Exh. C).

4 Releases. Settlement Class Members will release only those claims that were or could have
 5 been brought arising from the factual allegations or legal claims asserted in the operative *Kang*
 6 and *Ibarra* complaints. Settlement ¶59. Plaintiffs Kang, Moses, and Ibarra will additionally
 7 provide a general release of claims including a Cal. Civil Code §1542 waiver. Settlement ¶¶60-62.

8 Class Representative Service Awards and Class Counsel Attorneys' Fees and Expenses.

9 The Settlement provides for class representative service awards of up to \$10,000 each for
 10 plaintiffs James Kang and Michael Moses to be deducted from the gross settlement fund.
 11 Settlement ¶38. Class Counsel will also seek up to one-third of the gross settlement fund
 12 (\$31,898,707) as attorneys' fees, in addition to litigation expenses actually incurred in the amount
 13 of \$99,568.96, to be deducted from the gross settlement fund. Settlement ¶37; Stevens Decl., ¶83.
 14 Plaintiff's Motion for Approval of Attorneys' Fees and Litigation Expenses, which accompanies
 15 this filing, addresses the fee request. If any appeal is taken (by plaintiffs, their counsel, or an
 16 objector) with respect to these requested amounts, such appeal(s) will not delay the distribution of
 17 any individual class member settlement payments. Settlement ¶¶37-38, 44. Any amounts not
 18 approved by the Court will be added to the net settlement fund for distribution to class members,
 19 Settlement ¶¶37-38, although those additional funds will not be distributed to the class if a timely
 20 appeal is taken from the Court's fees award (including by an objector), until after that appeal is
 21 resolved. Settlement ¶46. All undisputed net settlement funds will be distributed to the class
 22 members within 42 days after the Effective Date (which will be the date the Court's order granting
 23 final approval becomes final, including the resolution of any appeals not related solely to
 24 attorneys' fees or class representative service awards). Settlement ¶¶44-46.

25 **C. Settlement Administration**

26 Pursuant to the Order Granting Motion for Preliminary Approval, on April 29, 2021, the
 27 Settlement Administrator mailed the approved class notice to the 4,939 class members identified
 28

1 in the data Wells Fargo provided to the Settlement Administrator. Pikus Decl., ¶¶8, 10.¹
 2 Consistent with the Settlement and the Order Granting Preliminary Approval, the Settlement
 3 Administrator searched for more recent addresses, took all reasonable steps to obtain correct
 4 addresses for class members whose notices were returned undeliverable, and re-mailed notices to
 5 254 class members for whom new addresses were located. *Id.*, ¶11. The Settlement Administrator
 6 also established a website and toll-free phone number to respond to class members' questions
 7 regarding the settlement. *Id.*, ¶¶5-6.

8 Class members who wished to opt out of the Settlement were required to submit a written
 9 request for exclusion by the response deadline of June 14, 2021. *Id.*, ¶10; Settlement ¶54. As of
 10 the date of this motion, the Settlement Administrator had received no requests for exclusion. Pikus
 11 Decl., ¶16.

12 Class members who did not opt out and who wished to object to the Settlement were
 13 required to do so by submitting written objections to the Court by the response deadline of June
 14, 2021. As of the date of this motion, class counsel are not aware of any objections filed with the
 15 Court, Stevens Decl., ¶43, and none have been submitted to the Settlement Administrator, Pikus
 16 Decl., ¶17. Class Counsel will file a supplemental brief addressing any timely objections after the
 17 response deadline has passed. Dkt. 110 ¶20.

18 Class members were given the opportunity to dispute the information used to estimate their
 19 individual settlement payments by submitting documentation to the Settlement Administrator
 20 postmarked by the response deadline. Settlement ¶54; Notice ¶10(D). As of the date of this
 21 motion, no disputes had been received. Pikus Decl., ¶15. Class counsel will report on any disputes
 22 and their resolution in their supplemental brief following the response deadline.

23

24

25 ¹ This number is somewhat smaller than overall class size assumed at the time the
 26 settlement was reached, *see* Dkt. 96-1, ¶34, apparently due to overlap between the *Ibarra* and
 27 *Kang* classes. The smaller-than-anticipated class size results in larger individual settlement
 28 payments than plaintiffs had estimated at the time of preliminary approval.

III. DISCUSSION

A. Final Certification of the Settlement Class and Subclasses is Appropriate.

The Court should make final the provisional class certification granted at the preliminary approval hearing. *Kang* Dkt. 110, ¶7. This Court and the court in *Ibarra* previously ruled that the proposed classes (including rest period and non-rest period subclasses) satisfied all requirements of Rule 23(a) and 23(b)(3). As set forth in plaintiffs' Motion for Preliminary Approval, *Kang* Dkt. 96 at 12, the proposed settlement modestly expands the number of class members by adding HMCs who had been excluded from the *Ibarra* and *Kang* classes because they had individual arbitration agreements and by extending the class period from its original end date (in *Kang*) of April 15, 2019 through December 31, 2019, the date that the Wells Fargo discontinued the pay structure challenged in *Kang*. However, the classes continue to assert the identical claims, based on the same Wells Fargo pay structure, that the courts previously certified. *Id.* Class certification for purposes of settlement continues to satisfy Rule 23 requirements, and the Settlement Class and Subclasses should be finally certified.

B. The Proposed Settlement is Fair, Reasonable, and Adequate and Merits Final Approval.

“[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.” *In re Syncor Erisa Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). The “universal standard” in evaluating the fairness of a settlement is whether the settlement is “fundamentally fair, adequate and reasonable.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982) (citations omitted). The Ninth Circuit has recognized that “the very essence of a settlement is compromise.” *Id.* at 624.

In evaluating the fairness of a settlement, the district court may weigh a variety of factors, including “the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026

1 (9th Cir. 1998) (citations omitted). The relative degree of importance to be attached to any
 2 particular factor depends upon the circumstances of each case. *Torrissi v. Tucson Elec. Power Co.*,
 3 8 F.3d 1370, 1376 (9th Cir. 1993). The pertinent factors strongly support approval of this
 4 settlement.

5 **1. The settlement is entitled to a strong presumption of fairness**

6 A proposed settlement is presumptively fair when: (1) it is reached through arm's-length
 7 negotiations; (2) the putative class is represented by experienced counsel; and (3) the parties have
 8 conducted sufficient discovery. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d
 9 Cir. 2005) (citation omitted). Those factors are readily satisfied in this case. The settlement is the
 10 product of arm's-length, non-collusive negotiations, with the assistance of highly respected
 11 mediator David Rotman; the class is represented by experienced counsel; and the cases were
 12 litigated through class certification, summary judgment, a damages trial, and appeals.

13 **2. The stage of the proceedings, extent of discovery and investigation, and prior
 14 litigation**

15 As discussed above, *Ibarra* was litigated through final judgment and appeal. Class counsel
 16 conducted the substantial discovery and investigation necessary to establish class certification,
 17 Wells Fargo's liability, and the calculation of damages under the parties' competing theories of the
 18 statutory interpretation of Section 226.7. The parties then litigated the Ninth Circuit appeal,
 19 resulting in that Court's affirmance of the liability finding. *Kang* was litigated through a contested
 20 class certification motion. *Kang* Dkt. 63. And for purposes of the global mediation, class counsel
 21 analyzed class member pay data for the entire proposed class. Stevens Decl., ¶42.

22 **3. The settlement amount, the strength of plaintiffs' case, and the risk, expense,
 23 complexity, and likely duration of further litigation**

24 The proposed \$95.6 million settlement is an outstanding result by any measure. The
 25 aggregate fund includes the \$25,696,122.35 that has already been paid toward the class judgment
 26
 27
 28

1 in *Ibarra* plus an additional \$70 million in *new* money from Wells Fargo.²

2 As discussed in plaintiffs' Motion for Preliminary Approval, the overall settlement value is
 3 equal to **47%** of Wells Fargo's maximum potential exposure, when calculated based on plaintiffs'
 4 construction of Labor Code §226.7. Courts routinely approve settlements reflecting far lower
 5 recoveries than this. *See, e.g., Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 331 (N.D. Cal.
 6 2014) (approving settlement equivalent to one-third of the defendant's maximum potential liability
 7 in wage payment case); *Dynabursky v. Alliedbarton Sec. Servs., LP*, 2016 WL 8921915, at *5
 8 (C.D. Cal. Aug. 15, 2016) (approving settlement equivalent to 27.5% of defendants' maximum
 9 potential liability in wage and hour action); *Vasquez v. Packaging Corp. of Am.*, 2020 WL
 10 2559490, at *8 (C.D. Cal. Mar. 27, 2020) (collecting cases approving settlements for 25-35% of
 11 total potential liability in wage and hour cases). Moreover, when calculated based on *Wells*
 12 *Fargo*'s construction of Section 226.7, the gross settlement fund represents fully **78%** of Wells
 13 Fargo's maximum potential exposure – *and nearly 3.6 times more than Wells Fargo's total*
 14 *potential Section 226.7 exposure*. Stevens Decl., ¶¶49-50.

15 The proposed *net* settlement fund (e.g., deducting the requested attorney's fees, costs and
 16 incentive awards) for class member payments equals \$63,034,915.26. Stevens Decl., ¶44. And
 17 individual settlement payments from that *net* fund range as high as \$53,122.41, with an *average*
 18 estimated payment from the net fund of \$12,762.69. Stevens Decl., ¶46. Such individual
 19 recoveries are nearly unheard-of in wage-and-hour litigation, *see, e.g.*, Dkt. 96-1 (Stevens
 20 Declaration in Support of Motion for Preliminary Approval), Exh. 2, and far outstrip recoveries
 21 even in similar rest period settlements on behalf of classes of bank loan officers compensated on

23 ² Where a defendant has already paid some benefits to class members during the course of
 24 the litigation, the value of those benefits is often considered in evaluating the settlement as a
 25 whole. *See, e.g., Richards v. Chime Financial*, No. 19-cv-06864-HSG, 2020 WL 6318713, at *2-3
 26 (N.D. Cal. Oct. 28, 2020); *Lewis v. Green Dot Corp.*, No. CV16-3557-FMO, 2017 WL 4785978,
 27 at *3 (C.D. Cal. June 12, 2017); *Gutierrez v. Stericycle*, No. CV15-08187-JAK, Order Granting
 28 Final Approval of Settlement (Dkt. 76; C.D. Cal. Mar. 22, 2019) (Dkt. 96-1, Exh. 3).

1 commission. For example, in *Boswell/Fernandez v. Bank of America*, settled with *Flanagan v.*
2 *Bank of America*, Case No. 613647/2018 (Supreme Court of New York, County of Suffolk), the
3 average individual share based on the *gross* settlement fund was \$7,061.29, while in *Loud v. U.S.*
4 *Bank, N.A.*, C.D. Cal. Case No. 8:18-CV-01235-DOC-DFM, the average share based on the *gross*
5 settlement fund was \$7,728.89. Dkt. 96-1, ¶44.

The settlement is particularly extraordinary in light of the risks, expense, and delay of litigating these cases to a final judgment. The settlement was reached against the backdrop of adverse authorities and enormous litigation risk on the central rest period claim in *Ibarra* and *Kang*. Throughout the time that *Ibarra* was being litigated in the Central District of California, no California appellate authority had construed Section 226.7(c)'s "regular rate of compensation" language, and all but one of the available district court decisions addressing the issue had ruled that "regular rate of compensation" referred to an employee's base hourly pay rate only, consistent with Wells Fargo's statutory interpretation.³ Shortly before the Ninth Circuit oral argument in *Ibarra*, the Court of Appeal panel majority ruled in *Ferra* that "regular rate of compensation" referred to an employee's base hourly pay rate, as the defendant in that case had argued. Although class counsel worked diligently to support the *Ferra* plaintiff's efforts to obtain a reversal of that appellate ruling in the California Supreme Court, by settling *Ibarra* and *Kang* now, before the Supreme Court rules, class counsel was able to eliminate the risk of an unfavorable ruling in *Ferra*, which could dramatically slash the potential recovery in these consolidated cases – while at

³ Compare *Bradesco v. Hillstone Rest. Group*, 2014 WL 5312546 (C.D. Cal. Sep. 18, 2014) (“regular rate of compensation” includes only the employee’s base hourly rate); *Wert v. U.S. Bancorp.*, 2014 WL 7330891 (C.D. Cal. Dec. 18, 2014) (same); *Brum v. Market Source, Inc.*, 2017 WL 2633414 (E.D. Cal. June 19, 2017) (same); *Frausto v. Bank of America, N.A.*, 2018 WL 3659251 at *5 (N.D. Cal. Aug. 2, 2018) (same); *Valdez v. Fairway Indep. Mortgage Corp.*, 2019 WL 3406912 (S.D. Cal. July 26, 2019) (same); *with Studley v. Alliance Healthcare Servs.*, 2012 WL 12286522 (C.D. Cal. July 26, 2012) (“regular rate of compensation” includes all forms of regular remuneration to the employee).

1 the same time ensuring the expeditious payment of those settlement funds to all eligible class
 2 members.

3 The non-rest period claims resolved by this settlement carried even greater litigation risks.
 4 In opposing class certification in *Kang*, Wells Fargo pointed out that another district court had
 5 rejected a vacation pay claim similar to that asserted in *Kang*. See *Kang* Dkt. 54 at 7 (citing
 6 *Nguyen v. Wells Fargo Bank, N.A.*, 2016 WL 5390245 (N.D. Cal. Sept. 26, 2016)). The minimum
 7 wage claim in *Kang* was based on California authorities holding that employers must compensate
 8 employees with at least the minimum wage for each hour worked, without “averaging” an
 9 employee’s compensation across all hours worked. See, e.g., *Armenta v. Osmose, Inc.*, 135
 10 Cal.App.4th 314 (2005); *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150 (9th Cir. 2016)
 11 (applying no-averaging principle to commissioned salespeople). The California Supreme Court
 12 recently restated the principle of the *Armenta* line of cases as a prohibition on “borrowing”
 13 compensation contractually promised for certain work time to pay employees for other work time,
 14 potentially creating new uncertainty as to the viability of plaintiffs’ minimum wage claim. See
 15 *Oman v. Delta Air Lines, Inc.*, 9 Cal.5th 762, 781-82 (2020). Similarly, the future viability of
 16 plaintiffs’ derivative claim for waiting time penalties under California Labor Code §203 could be
 17 determined by the California Supreme Court’s pending decision in *Naranjo v. Spectrum Sec.*
 18 *Servs.*, Case No. S258966. And Wells Fargo has also suggested that the non-rest period claims
 19 asserted in *Kang* are barred by the *Ibarra* judgment with respect to time periods covered by that
 20 judgment. In short, if the proposed settlement were not approved, there would surely be substantial
 21 further litigation in *Kang*, including summary judgment, perhaps trial, and further appeals, to
 22 establish Wells Fargo’s liability and class damages. The settlement saves the class members from
 23 these substantial risks and further delay.

24 **4. Experience and views of counsel**

25 Class counsel have extensive experience and success litigating, trying, and settling wage
 26 and hour class actions. Stevens Decl., ¶¶56-67; Haffner Decl., ¶¶3-7. Class counsel are extremely
 27 knowledgeable about the strengths, weaknesses and potential value of the claims asserted in this
 28 case. Stevens Decl., ¶55; Haffner Decl., ¶16. Class counsel believe that the amount of the

1 settlement is “fair, reasonable, and adequate,” and that, considering the risks of continued
 2 litigation, this settlement is within the range of reasonableness and fair to the class and subclasses.
 3 Stevens Decl., ¶55; Haffner Decl., ¶16.

4 **5. Class members’ reactions to the proposed settlement**

5 As of the date of this motion, no class members have requested exclusion from the
 6 Settlement or submitted objections, indicating strong support for the Settlement. *See supra* at 10-
 7 11. Class counsel will further address the response of class members to the proposed Settlement in
 8 their supplemental brief following the response deadline.

9 **C. The PAGA Component of the Settlement Should Be Approved**

10 Under Labor Code §2699(l), the Court must also “review and approve any penalties sought
 11 as part of a proposed settlement agreement” of PAGA claims. The PAGA component of a
 12 settlement should be approved “where the settlement terms (1) meet the statutory requirements set
 13 forth by PAGA, and (2) are fundamentally fair, reasonable, and adequate in view of PAGA’s
 14 public policy goals.” *Quiruz v. Specialty Commodities, Inc.*, No. 17-cv-03300-BLF, 2020 WL
 15 6562334, at *3 (N.D. Cal. Nov. 9, 2020) (quotation omitted). “[W]here a settlement for a Rule 23
 16 class is robust, the statutory purposes of PAGA may be fulfilled even with a relatively small award
 17 on the PAGA claim itself, because such a settlement not only vindicates the rights of the class
 18 members as employees, but may have a deterrent effect upon the defendant employer and other
 19 employers, an objective of PAGA.” *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869, at *9 (N.D.
 20 Cal. Oct. 11, 2016).

21 The PAGA component of this Settlement readily satisfies these standards. Plaintiffs
 22 estimated the value of the PAGA claims asserted in *Kang* at approximately \$13 million, and the
 23 parties allocated \$750,000 of the gross settlement value to PAGA penalties. Stevens Decl., ¶51.⁴
 24

25 ⁴ The potential PAGA recovery decreased significantly during the course of the *Kang*
 26 litigation. Stevens Decl., ¶51. Plaintiffs originally sought to recover unpaid wages as well as civil
 27 penalties through the PAGA claim, pursuant to Labor Code §558. *Kang* Dkt. 64, ¶54. In 2019, the
 28

1 The settlement properly allocates 75% of the PAGA component to the LWDA, and 25% to the
 2 employees. *See Labor Code §2699(i).* As discussed above, the settlement as a whole is
 3 extraordinarily robust and will provide individual recoveries in the tens of thousands of dollars,
 4 thereby vindicating the rights of Wells Fargo's employees and sending a powerful deterrent
 5 message to other California employers. Here, even the modest allocation from the gross settlement
 6 fund to PAGA penalties effectuates PAGA's policy goals, and warrants approval. *See Quiruz,*
 7 2020 WL 6562334, at *9.

8 **D. The \$10,000 Class Representative Service Awards Merit Final Approval**

9 Thanks to the named plaintiffs' willingness to prosecute these actions, class members will
 10 reap substantial individual recoveries through this settlement without the risk and delay of further
 11 litigation. Their efforts should be compensated with reasonable service awards.

12 Courts routinely approve service awards to compensate named plaintiffs for the work
 13 undertaken on behalf of the class, the risks they incurred during the class action litigation, and
 14 sometimes, to recognize their willingness to act as a private attorney general. *See, e.g., Rodriguez*
 15 *v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). In evaluating proposed class
 16 representative service awards, courts in the Ninth Circuit consider the number of named plaintiffs
 17 receiving awards, "the proportion of the payments relative to the settlement amount, and the size
 18 of each payment." *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 462 (E.D. Cal. 2013).

19 The Settlement provides for Class Representative Service Awards of \$10,000 each to
 20 plaintiffs Kang and Moses. Settlement ¶38. These proposed awards are consistent with the
 21 \$10,000 service award already approved by Judge Anderson for plaintiff Ibarra, *see Stevens Decl.*,
 22 ¶80, and with amounts commonly awarded in district courts in the Ninth Circuit. *See, e.g., Quiruz,*
 23 2020 WL 6562334, at *11 (approving \$10,000 class representative service award); *Spann v. J.C.*
 24 *Penney Corp.*, 211 F.Supp.3d 1244, 1265-66 (C.D. Cal. 2016) (same); *Dyer*, 303 F.R.D. at 335

25

26

27 California Supreme Court held that unpaid wages may not be recovered through a PAGA penalties
 28 claim. *See Z.B., N.A. v. Superior Court*, 8 Cal.5th 175 (2019).

1 (same); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 267 (N.D. Cal. 2015) (“Incentive
 2 awards typically range from \$2,000 to \$10,000.”).

3 The proposed service awards compensate the named plaintiffs for their time and effort in
 4 this litigation, including by participating actively in discovery, helping to identify important
 5 documents that helped establish Wells Fargo’s liability, and identifying additional class members
 6 to assist in counsel’s investigation. In addition, the named plaintiffs undertook the risks of
 7 retaliation or reputational harm in the banking industry, and of the payment of costs in the event
 8 the litigation had been unsuccessful. The named plaintiffs are also providing a general release that
 9 encompasses all potential individual claims. *See Dkt. 96-1, ¶¶77-80; Kang Decl., ¶¶4-8; Moses*
 10 *Decl., ¶¶4-9; see, e.g., Bellinghausen*, 306 F.R.D. at 267-68 (approving service award based on
 11 plaintiff’s participation in the litigation, risks undertaken, and agreement to general release);
 12 *Boring v. Bed Bath & Beyond*, 2014 WL 2967474, at *3 (N.D. Cal. June 20, 2013) (same); *Smith*
 13 *v. Kaiser Foundation Hosps.*, 2020 WL 5064282, at *21 (S.D. Cal. Aug. 26, 2020) (preliminarily
 14 approving service awards where named plaintiffs participated in the litigation and signed a
 15 “broader release”).

16 The total value of the proposed service awards represents a tiny fraction – three one-
 17 hundredths of 1% -- of the gross settlement value, another factor establishing the reasonableness
 18 of the proposed service awards. *See, e.g., In re On-Line DVD Rental Antitrust Litig.*, 779 F.3d 934,
 19 947-48 (9th Cir. 2015) (approving service awards comprising in the aggregate less than 1% of the
 20 gross settlement value); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000)
 21 (approving service awards comprising 0.56% of total settlement fund).

22 Finally, the relationship between the proposed service awards to the range of individual
 23 settlement payments also supports the proposed awards. Individual class member recoveries from
 24 the net settlement fund will be *on average* approximately \$12,762.69, *exceeding* the proposed
 25 \$10,000 service awards. This is further evidence that the proposed service awards are reasonable,
 26 as Judge Anderson already found with respect to plaintiff Ibarra. *See, e.g., Wren v. RGIS Inventory*
 27 *Specialists*, 2011 WL 1230826, at *37 (N.D. Cal. Apr. 1, 2011) (approving service awards that
 28 exceeded the average settlement payment but were less than the largest settlement payments).

CONCLUSION

2 For the foregoing reasons, the Court should grant final approval of the Settlement. The
3 Court should also approve the class representative service awards of \$10,000 each to plaintiffs
4 James Kang and Michael Moses.

5 | DATED: May 28, 2021

Respectfully submitted,

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